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HOLD ON, MR. PRESIDENT! NOT SO FAST WITH THOSE QUICKIE ELECTIONS

By David Phippen
Fairfax Office

The “**quickie elections**” rule of the National Labor Relations Board, which took effect on April 30, is on hold after a federal court **ruled** Monday that the Board lacked a quorum and had not effectively promulgated the rule.

Judge James E. Boasberg of the U.S. District Court for the District of Columbia held that the Board failed to comply with the three-member quorum requirement of the National Labor Relations Act when it took action late in December 2011 promulgating the final rule for fast-tracking elections. The only members who participated and voted were Chairman Mark Gaston Pearce and then-member Craig Becker, both Democrats. Although Republican Brian Hayes was a member, and received electronic notice of the proposed action, he did not vote or otherwise participate in the final action. Under the plain language of the NLRA **and a 2010 Supreme Court decision interpreting it**, a quorum of three members is needed for the Board to take action.

Judge Boasberg held that Hayes’ membership on the Board at the time did not constitute “participation” in the Board’s action. Thus, the court held that the final rule was not validly adopted and had to be set aside.

What’s Next

In light of the court’s decision, **the NLRB issued a notice** yesterday saying that the Acting General Counsel has advised the Regions to revert to the prior procedures and rules, which can in some circumstances give employers a longer time before elections to campaign against union representation.

Of course, nothing prevents the Board from voting to reinstate the “quickie election” rule with a proper quorum, as Judge Boasberg pointed out. The Board now has five members, but **three recent recess appointments are being challenged** as we speak. Without at least three valid appointments, there can be no quorum.

If you have any questions, please contact any member of Constangy’s **Labor Relations Practice Group**, or the Constangy attorney of your choice.

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